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No. 78-1634

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, PETITIONER

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14
OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 593 F. 2d 83. The findings of fact and conclusions of law of the district court (Pet. App. 14a-19a) are ~~also~~ not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1979. The petition for a writ of

certiorari was filed on April 24, 1979.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that the Regional Director had reasonable cause to believe that the Union was promoting a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, and that an injunction should therefore issue pursuant to Section 10(*l*) to restrain such conduct pending the final administrative determination of the unfair labor practice charge.

STATUTE INVOLVED

The National Labor Relations Act (29 U.S.C. 151 *et seq.*), provides in part:

a. Section 8(b), 29 U.S.C. 158(b):

It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

[1] Petitioner applied to this Court for a stay of the mandate of the court of appeals pending the filing and disposition of a petition for a writ of certiorari (No. A-835, October Term, 1978). The application was denied, initially Mr. Justice Blackmun and later by the full Court.

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, * * *

* * * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution * * *.

b. Section 10(*l*), 29 U.S.C. 160 (*l*):

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred

has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law * * *.

STATEMENT

1. Petitioner (the "Union") represents the production and maintenance employees at the Bridgeton, Missouri, plant of Hussmann Refrigerator Company. Hussmann is one of the numerous subsidiaries and operating divisions of Pet, Inc., a large, diversified conglomerate (Pet. App. 14a-15a). The subsidiaries and divisions of Pet, Inc., engage in a wide variety of business ventures and produce, distribute and sell unrelated products and services (J.A. 175, 178-181).[2] The management of each of the various subsidiaries and divisions is autonomous: each establishes its own product lines; determines its own pricing, advertising and marketing strategies; sets its own profit targets; and pays its own bills, including the cost of any services rendered or products purchased on its behalf by

[2] "J.A." refers to the Joint Appendix in the court of appeals.

the parent corporation (J.A. 175, 177-178, 181). Each subsidiary and division has a president with complete authority in employment and labor relations matters. The division president establishes the wages, benefits and other terms and conditions of employment within his division, and has full authority to negotiate and administer collective bargaining agreements (J.A. 175, 177-178, 28-29).

2. On May 1, 1977, the collective bargaining agreement expired at the Bridgeton plant. Since that date, the Union has been engaged in an economic strike with Hussmann. In support of this strike, the Union president announced at a press conference on October 21, 1977, that the Union would seek "a national boycott * * * of Pet, Inc. food products, their retail store outlets and commercial refrigeration equipment" (Pet. App. 14a-15a). The Union thereafter placed advertisements in newspapers and distributed handbills requesting the general public, including union members and sympathizers, not to patronize any retail stores owned by Pet and to refuse to buy any product produced by Pet and its subsidiaries and divisions (J.A. 265-266, 41-42, 53-55, 143, 179-180). The handbilling was unaccompanied by picketing, was conducted in orderly fashion remote from the premises of any Pet plant or store, and caused no work stoppages by any employees (Pet. App. 15a-16a).

3. In November 1977, Pet filed an unfair labor practice charge with the Board's Regional Director, alleging that the Union was promoting a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the

National Labor Relations Act, 29 U.S.C. 158(b)(4)(ii)(B) (Pet. App. 16a). The Regional Director found that there was reasonable cause to believe that the charge was true and issued an unfair labor practice complaint. Pursuant to Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), the Regional Director also petitioned the United States District Court for the Eastern District of Missouri to enjoin the Union from engaging in its challenged boycott activities pending final resolution of the unfair labor practice charge by the National Labor Relations Board (Pet. App. 14a, 3a).

4. The district court concluded that no evidence has been presented to it to establish "that the Union sought to force, coerce or restrain individuals," or that it "had as its object the forcing of any employer to cease doing business with Hussmann" (Pet. App. 19a), and that the Union's actions therefore "do not fall within the prohibitions of the Act" (*ibid.*). The court accordingly denied the Regional Director's request for injunctive relief.

The court of appeals reversed. The court noted that, under Section 10(*l*) of the Act, the district court must determine only "whether the Board had reasonable cause to believe the Act was being violated as charged, and if it so concludes, it must grant such relief as it deems just and proper" (Pet. App. 9a). The court of appeals concluded that, while "the conduct of the Union cannot readily be characterized as being or as not being a 'secondary boycott' generally prohibited by § 8(b)(4)(ii)(B)," "[u]pon the record now before us, we are convinced that there

was reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a).[3] The court remanded the case to the district court with instructions to issue an injunction "as prayed for by the Director," if "the conduct in question is still going on or is likely to be resumed and if the Board's ruling on the issues before it is not to be expected immediately" (*ibid.*).[4]

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the court of appeals applied an incorrect legal standard in directing issuance of the injunction under Section 10(*l*). Petitioner argues that an injunction should not issue under Section 10(*l*) if the court "is convinced that the General Counsel's legal position is wrong" (Pet. 11, quoting *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers Union*, 494 F.2d 1230, 1245 (2d Cir. 1974)). It is apparent, however, that in this case the court of appeals was *not* "convinced that the General Counsel's legal posi-

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[3] With regard to petitioner's claims based on the First Amendments and on the "publicity proviso" of Section 8(b)(4)(ii)(B), the court stated that the arguments "are not insubstantial" but need not be resolved "at this essentially preliminary stage of the unfair labor practice proceeding" (Pet. App. 11a n.3).

[4] On remand, the district court found that the Union "has continued and is continuing to engage in its boycotting activities." The court entered an injunction "limited to ninety days," subject to modification at the expiration of that period. *Solien* v. *United Steelworkers of America, AFL-CIO-CLC*, No. 78-277 C (3) (Apr. 25, 1979) (App., *infra*, 2a-4a).

tion [was] wrong." [5] Thus, even under petitioner's interpretation of the proper legal standard, the injunction was properly issued, and further review of the decision in this case is therefore unwarranted.

a. Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), embodies the determination of Congress that certain unfair labor practices, such as secondary boycotts,

[5] There is thus no conflict between *Danielson* and the decision in this case, as petitioner contends (Pet. 11-12). In *Danielson*, the court refused to sustain the issuance of an injunction under Section 10(*l*) upon finding that the General Counsel's legal theory was "a strained and wholly unnatural construction" of the Act and produced a result that Members of Congress "had assured was not intended by the secondary boycott provisions" of the Act (*id.* at 1237). In a case such as this, where the court found "reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a), the Second Circuit has held that an injunction is warranted under Section 10(*l*). *Danielson* v. *International Organization of Masters, Mates & Pilots, AFL-CIO*, 521 F.2d 747, 751 (2d Cir. 1975) ("In determining whether an injunction under § 10(*l*) should issue, it is well settled that the district court need not decide that an unfair labor practice has actually occurred but merely must decide whether the Board has reasonable cause to believe there has been a violation of the Act").

Humphrey v. *International Longshoremen's Ass'n, AFL-CIO*, 548 F.2d 494 (4th Cir. 1977), is also consistent with the decision in this case. The court noted in *Humphrey* that, "while a temporary injunction should not issue unless there is some reasonable possibility that the Board will ultimately enter an enforceable order, the General Counsel's resolution of disputed issues of law and fact should be accorded considerable deference in determining whether such possibility exists" (*id.* at 498). The court concluded in *Humphrey* that the General Counsel had established reasonable cause to believe that a violation of the Act had occurred and that an injunction should issue under Section 10(*l*). 548 F.2d at 497.

threaten particularly serious interruptions to commerce and require particularly swift governmental regulation to avert irreparable injury to the policies of the Act. Thus, in that section, Congress directed the Board's Regional Directors to apply for injunctive relief in the federal district courts whenever the Directors determine that there is reasonable cause to believe that such an unfair labor practice has occurred. The district courts are then to grant such injunctive relief in these cases as is "just and proper." See S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947); I *Legislative History of the Labor Management Relations Act, 1947*, 414, 433 (1948); *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 471*, 491 F.2d 200, 203 (8th Cir. 1974).

The action for an injunction under Section 10(*l*) is ancillary to the unfair labor practice proceedings. The injunction expires when the Board renders its final decision on the underlying unfair labor practice charge. See 29 U.S.C. 160(*l*); *Sears, Roebuck & Co.* v. *Carpet Layers*, 397 U.S. 655 (1970). Accordingly, in a proceeding for an injunction under Section 10(*l*),

> the district court is not called upon to decide whether, in fact, a violation has occurred. The determination of this question is reserved exclusively for the Board with review by the Court of Appeals under section 10(e) and (f) of the Act. The inquiry of the district court is limited to a determination of whether the Board has reasonable cause to believe the Act was being violated as charged, and if it so concludes, it

must grant such relief as it deems just and proper.

Wilson v. *Milk Drivers & Dairy Employees Union, Local 471, supra*, 491 F.2d at 203. See also *Dawidoff* v. *Minneapolis Bldg. & Const. Trades Council*, 550 F.2d 407, 410 (8th Cir. 1977); *Squillacote* v. *Graphic Arts Int'l Union, AFL-CIO Local 277*, 540 F.2d 853, 858 (7th Cir. 1976); *Hirsch* v. *Building & Construction Trades Council*, 530 F.2d 298, 302 (3d Cir. 1976).[6]

b. The court of appeals correctly concluded that "[u]pon the record now before us, * * * there was reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a).

The undisputed evidence adduced by the Regional Director showed that the Union, in furtherance of its strike at Hussmann's Bridgeton plant, sought through newspaper advertisements and handbills to induce the general public to boycott *all* retail stores owned by Pet, Inc., and to refuse to buy *any* product produced by Pet, Inc., and its subsidiaries (see page 5, *supra*). The necessary—and presumably intended—effect of this conduct was to "threaten, coerce, and restrain" Pet and its autonomous operating divisions to induce them to pressure Hussmann

[6] As the court of appeals stated in this case (Pet. App. 9a), once the court determines that there is reasonable cause to believe the Act was being violated, the injunction should issue "to permit the Board a reasonable time to make the initial determination which Congress has entrusted it to make."

to accede to the Union's contract demands.[7] The essential elements of a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. 158(b)(4)(ii)(B), were therefore established.

The fact that Hussmann and other subsidiaries of Pet are wholly owned by the parent corporation does not, by itself, make Pet, Hussmann, and the other subsidiaries a single employer such that all may be subjected to union pressure in a labor dispute involving only one of them. Corporate subsidiaries (or even unincorporated divisions of a single corporate entity) are regarded as separate employers in the absence of joint exercise of control over the day-to-day operations or the labor relations of each. Without such day-to-day control, each is insulated by Section 8(b)(4)(ii)(B) of the Act from the labor disputes of the others. See, *e.g.*, *Miami Newspaper Pressmen's Local No. 46* v. *National Labor Relations Board*, 322 F.2d 405, 409 (D.C. Cir. 1963); *Bachman Machine Co.* v. *National Labor Relations Board*, 266 F.2d 599 (8th Cir. 1959); *Los Angeles Newspaper Guild, Local 69 (Hearst Corporation)*, 185 N.L.R.B. 303 (1970), enforced, 443 F.2d 1173 (9th Cir. 1971), cert. denied, 404 U.S. 1018 (1972); *American Federation of Television & Radio Artists, Washington-Baltimore Local, AFL-CIO (Baltimore News American Division, Hearst Corporation)*, 185 N.L.R.B. 593 (1970), enforced, 462 F.2d 887 (D.C.

[7] As the district court noted, "it is obvious that the Union sought [the] consumer boycott * * * to exert the maximum * * * pressure * * * upon Hussmann to end its dispute with the Union" (Pet. App. 19a).

Cir. 1972). As is shown at pages 4-5, *supra*, each Pet subsidiary and division is operated as a separate, independent business entity, and the president of each division has almost complete control over its daily operations and labor relations.[8]

There is also reasonable cause to believe that the Union's activity is not protected as "publicity" or truthful advertising by the second proviso to the secondary boycott prohibition in Section 8(b)(4)(ii)(B).[9] This proviso applies only when the advertising or publicity is designed to inform the public that an employer is distributing products produced by another

[8] Pet retains control over the financial policies of the divisions. The profits or losses of the divisions pass directly to Pet, and the divisions are consolidated for financial and tax purposes. As the Board observed in *Los Angeles Newspaper Guild, Local 69 (Hearst Corporation)*, *supra*, 185 N.L.R.B. at 304, however, this is "inherent in common ownership," and does not reflect the exercise of any actual, centralized control over the separate operations.

[9] That proviso reads (29 U.S.C. 158(b)(4)(ii)(B)):

> *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution * * *.

employer with whom the union has a primary labor dispute. See *ibid.*; *NLRB* v. *Servette, Inc.*, 377 U.S. 46 (1964). Since petitioner was enjoined from directing its publicity only at those subdivisions of Pet. which cannot be said to "distribute" products or services "produced" by Hussmann (App., *infra*, 4a) the proviso is inapplicable to this case.[10]

2. Contrary to petitioner's assumption, the court of appeals did not enjoin "indefinitely conduct that may be privileged by the First Amendment without first adjudicating whether the activity is, in fact, so privileged" (Pet. 16). An injunction under Section 10(*l*) is effective only until a final Board adjudication of the unfair labor practice charge. In this case, the district court has limited its injunction to a period of 90 days and has carefully structured the scope of the injunction to ensure that the Union's First Amendment rights would not be infringed during that period (App., *infra*, 2a-4a). Moreover, the question whether a limited ban on the Union's con-

[10] Contrary to petitioner's contention (Pet. 7), *NLRB* v. *Servette, Inc.*, *supra*, is not inconsistent with this conclusion. In *Servette*, the Court approved the Board's application of the publicity proviso to cases where the primary employer was the wholesaler of products sold by the target of the publicity, holding that "[i]t would fall far short of achieving [its] basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor" (*id.* at 55). *Servette* does not hold that the proviso protects a consumer boycott appeal where, as here, there are no business dealings between the primary employer and the neutral employers sought to be boycotted.

sumer boycott campaign would violate the First Amendment was fully briefed and argued by all parties. The court of appeals specifically noted that the "claims of the Union based on the first amendment * * * are not insubstantial" (Pet. App. 11a n.3). Although the court did not finally resolve petitioner's First Amendment contentions "at this essentially preliminary stage" (*ibid.*), there is nothing to suggest that the court did not consider those contentions in making a reasonable cause determination under Section 10(*l*). Rather, it appears that the court concluded that, while petitioner's contention is not insubstantial, the arguments advanced by the Regional Director were sufficiently substantial to justify the issuance of a temporary injunction pending a final adjudication of the matter of the Board. The Board's ultimate decision on the merits is, of course, subject to further review by the court pursuant to Section 10(e) or (f) of the Act. *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 471, supra,* 491 F.2d at 203.

In any event, petitioner is mistaken in contending (Pet. 15) that the Act violates the First Amendment by prohibiting the distribution of handbills and the publication of newspaper advertisements that call for a secondary boycott of a neutral employer. "[I]t has never been deemed [to be] an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Stor-*

age Co., 336 U.S. 490, 502 (1949). This is particularly true in the area of labor-management relations. See, *e.g., NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 616-620 (1969); *Electrical Workers* v. *NLRB,* 341 U.S. 694, 703-705 (1951). Union-sponsored publicity that specifically calls for economic action against a neutral employer does more than merely "disseminate information" or simply express the union's view regarding the merits of the dispute. It is economic action that may be constitutionally regulated by Congress through its plenary power to regulate and promote interstate commerce. See *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 439 (1911).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1979

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-277 C (3)

JOSEPH H. SOLIEN, ETC., PETITIONER

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, RESPONDENT

MEMORANDUM

On March 19, 1979, the United States Court of Appeals for the Eighth Circuit issued its mandate herein, remanding this cause to the Court for further proceedings in accordance with the opinion of the Court of Appeals. Said opinion provides in relevant part:

> . . . the district court should determine whether and to what extent the Union conduct complained of is being continued or is likely to be resumed and the status of the proceeding before the Board. If it appears to the district court that the conduct in question is still going on or is likely to be resumed and if the Board's ruling on the issues before it is not to be expected immediately, an injunction should issue as prayed for by the Director. We leave the question of duration of the injunction in the first instance to the discretion of the district court. In any

> event, if it appears that agency action is being unreasonably delayed, the Union may apply under Fed. R. Civ. P. 60(b) for a modification of the terms of or dissolution of the injunction. *Solien* v. *United Steelworkers of America, AFL-CIO-CLC*, No. 78-1411 (8th Cir. February 22, 1979), slip opinion at p. 14-15.

From the record before this Court, it appears that respondent has continued and is continuing to engage in its boycotting activities. Petitioner has advised this Court by motion that "it is very unlikely that the decision of the National Labor Relations Board will be issued within the next 90 days". As noted by the Court of Appeals, however,

> . . . the parties have waived a hearing before an administrative law judge and submitted the case to the Board on an agreed record. Slip opinion at p. 15, footnote 2.

Based on this record, an injunction will issue. Its duration will be limited to ninety days. At the expiration of such period, either party may seek modification.

/s/ John P. Nangle
United States District Judge

Dated: April 25, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-277 C (3)

JOSEPH H. SOLIEN, ETC., PETITIONER

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, RESPONDENT

ORDER

Pursuant to the memorandum filed this date, and in accordance with the mandate of the United States Court of Appeals for the Eighth Circuit,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that pending final disposition of the matters involved herein now pending before the National Labor Relations Board, or the expiration of ninety days from this date, whichever occurs sooner, respondent United Steelworkers of America, AFL-CIO-CLC, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it, be and are enjoined and restrained from:

> Engaging in, or permitting to remain in existence or effect, any publicity campaign directed against Stuckey's, Inc.; Southland Canning and Packing Company, Inc.; Violet Packing Company, Inc.; Mountain Pass Canning Company; Old El Paso; Gulf Belle & Orleans; Fungston

Nuts; Whitman's Chocolates; Mr. Panel; Vendrom Liquor Stores; Reese Finer Foods; Musselman Fruit Products; or Pet, Incorporated, its subsidiaries and divisions, except its Bridgeton, Missouri Division of Hussmann Refrigerator Company and Hussman's distributors, or in any manner or by any means, including picketing, orders, directions, instructions, requests or appeals, however given, made or imparted, or by any like or related acts or conduct or by permitting any such to remain in existence or effect, threatening, coercing or restraining any other person engaged in commerce or in any industry affecting commerce where an object thereof is to force or require their customers to cease doing business with such persons or to cause such persons to cease doing business with each other or with Hussmann Refrigerator Company.

/s/ John P. Nangle
United States District Judge

Dated: April 25, 1979.

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